STATE OF MICHIGAN

COURT OF APPEALS

AUGUSTINE COOK and CHARLES COOK, Plaintiffs-Appellees, v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, a/k/a SMART, and CLARENCE HALMON, Defendants-Appellants.	UNPUBLISHED March 25, 2003 No. 234481 Wayne Circuit Court LC No. 00-001520-NI

Before: White, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment in favor of plaintiffs for $2,534,630 in this personal injury case. We affirm.

Defendants first argue that the trial court erred in refusing defendants' request to impeach plaintiff, Augustine Cook (plaintiff), with the complaint and to admit the complaint as substantive evidence. We agree that the court erred, but conclude that the error was harmless.

Plaintiffs' complaint alleged that "Mrs. Cook was driving her automobile on Gratiot Road near its intersection with Meldrum in the City of Detroit. . ." that defendant "Halmon was driving a Smart Bus in the same vicinity which was located behind Ms. Cook's automobile" and that "Ms. Cook slowed her vehicle in order to make a right hand turn when it was struck in the rear by Halmon and the Smart Bus." At trial, plaintiff asserted that the accident occurred at Gratiot and Beufait. Beufait and Meldrum are approximately 350 feet apart. Defendants maintained that the accident occurred at Meldrum. The location was of consequence because of the divergent accounts of what happened.

The trial court denied defendants' request to impeach with and admit the complaint, stating that Cook "should have had a chance to review or adopt it or something like that." Generally, "[a] party should be allowed "free rein" to compare the pleadings with the testimony presented at trial. *Vachon v Todorovich*, 356 Mich 182, 187; 97 NW2d 122 (1959); *Boggerty v Wilson*, 160 Mich App 514, 527; 408 NW2d 809 (1987). Such a rule discourages deceptive pleading and "its observance affords a time-tried and altogether valuable means of getting at the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

truth where facts are disputed." *Vachon, supra* at 187-188. However, this rule is applicable only to statements of fact in a pleading, not general allegations pleaded to meet the requirements of a valid claim, or to inconsistent assertions in alternative counts. *Larion v City of Detroit*, 149 Mich App 402, 407; 386 NW2d 199 (1986).

Here, the complaint does not involve alternative pleading or multiple defendant theories. Rather, plaintiffs' theory of recovery was based on one location of the accident, and this location was incorporated into each count of the complaint. Therefore, the trial court abused its discretion in denying defendants' use of plaintiffs' complaint to impeach Cook or as an admission by plaintiffs that the accident occurred on Gratiot "near its intersection with Meldrum."

However, error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001). Here, the error was harmless because the jury was otherwise informed that Cook had initially believed the accident occurred at Gratiot and Meldrum Street. Cook freely admitted in court that she initially believed the accident occurred at Meldrum Street. Defendants were permitted to compare Cook's earlier beliefs to her trial testimony as to the location of the accident. There was evidence presented to support both sides' positions on the location of the accident. In light of plaintiff's testimony at trial regarding her initial belief regarding the location, it strains credulity to conclude that the jury would have decided differently had it only been aware of the complaint. As to defendants' arguments regarding the significance of a judicial admission, the complaint only placed the accident on Gratiot "near its intersection with Meldrum." Beufait is near Meldrum. Cook's admissions at trial that she initially believed that the accident happened at Meldrum were stronger than the allegations of the complaint. Further, there was evidence that the bus driver was negligent regardless of the location of the accident. We conclude that defendants' substantial rights were not affected by the trial court's ruling.

Defendants next argue the trial court abused its discretion in denying defendants' request for a mistrial based on plaintiffs' counsel's misconduct. We disagree. This Court will not interfere with a trial court's disposition of a motion for a mistrial unless there was an abuse of discretion resulting in a miscarriage of justice. *Persichire v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999.)

Before trial, plaintiffs filed a motion in limine requesting that the trial court allow evidence of SMART's disciplinary actions concerning the bus driver, Halmon, to be admitted at trial. Halmon was suspended by SMART after there was a determination that Halmon could have avoided the accident. The trial court denied plaintiffs' motion "to allow evidence regarding discipline administered to Halmon." During plaintiffs' opening statement, plaintiffs' counsel stated to the jury that "[y]ou'll hear from his [Halmon's] supervisor as to who his supervisor and his investigation determined was at fault for this." Halmon's supervisor was Martin Moore (Moore). During plaintiffs' counsel's cross-examination of Moore, he asked, "did you tell him he [Halmon] was at fault for the accident." Defense counsel objected, requested a bench conference, and moved for a mistrial based upon the conduct of plaintiffs' counsel. The trial court sustained the objection, but denied defendants' motion for a mistrial.

Claims of misconduct of counsel are generally reviewed initially to determine whether the claimed error was in fact error, was harmless, and was properly preserved by objection or a

motion for mistrial. *Badalamenti v William Beaumont Hosp - Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999). Comments that improperly and unfairly influence the jury merit a new trial, *Willoughby v Lehrbass*, 150 Mich App 319, 333-334; 388 NW2d 688 (1986), but in the absence of a deliberate course of conduct designed to prevent a fair and impartial trial, reversal is not required, *Kubisz v Cadillac Gage*, 236 Mich App 629, 638; 601 NW2d 160 (1999). Misconduct of counsel will not justify a new trial if the error was harmless, *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 682; 630 NW2d 356 (2001), but a new trial may be granted if "the court cannot say that the result was not affected," *Badalamenti*, *supra* at 290.

We conclude that the trial court did not abuse its discretion in denying defendants' motion for a mistrial. First, the plain language of the order prohibited "evidence regarding discipline administered to Halmon. . . ." When defendants moved for a mistrial, the trial court reiterated, "the only thing I ruled . . . was that the discipline that was imposed would not be admissible. In other words, the suspension, the corrected [sic] action that was taken by SMART, and that was it." Thus, defendants' objection was not directed toward evidence excluded by the in limine ruling, but rather, plaintiffs' counsel's attempted elicitation of Moore's opinion regarding Halmon's fault in the accident. Further, the trial court sustained the objection, and after the motion for mistrial and the court's ruling that plaintiffs could not ask questions about the witness' opinion on fault, plaintiffs' counsel refrained from returning to the subject. Given that the in limine order was not violated and no prejudicial evidence was admitted, the trial court did not abuse its discretion in denying the motion for mistrial. *Kubisz*, *supra*.

Defendants' final claim is that the trial court abused its discretion in denying defendants' motion for a new trial or, alternatively, remittitur based on plaintiffs' conduct during discovery. We disagree. This Court reviews a trial court's decision to deny a motion for a new trial or remittitur for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260-261; 617 NW2d 777 (2000) (new trial); *Bordeaux v Celotex Corp*, 203 Mich App 158, 171; 511 NW2d 899 (1993) (remittitur).

Defendants argue they are entitled to a new trial or remittitur because plaintiffs lacked candor during the discovery process. Specifically, defendants contend that plaintiffs' answers to interrogatories and deposition questions regarding wage loss were inconsistent with their trial testimony. Defendants primarily rely on *Rock Island Bank & Trust Co v Ford Motor Co*, 54 Mich App 278, 280-281; 220 NW2d 799 (1974), which reversed a verdict because the party, in violation of a court order, withheld discoverable material that may have made a difference in the way the defendants' counsel approached the case or prepared for trial.

At trial, plaintiff and her husband testified that plaintiff was off work at the time of the accident, and was not ready to return to work at that time, but planned to return to work sometime in the future. Counsel argued that plaintiff's injuries caused her not to return to work as planned, and that she was entitled to damages for future economic loss.

Plaintiff answered defendant's interrogatories pertinent to this issue as follows:

> 34. State whether there are any *outstanding wage loss benefits* and, if so, specify for which period of time.

ANSWER**:** No.

35. Itemize all other items of *expense and loss which were incurred* by you or on your behalf as a result of the incident here sued upon for which you ask compensation in this case.

ANSWER**:** This information is still being compiled.

* * *

38. Exactly how much income, if any, do you claim *to have lost to date* as a result of the incident complained of?

ANSWER: This information is being determined.

39. State *whether you were employed*, or had a business, trade or profession of your own *at the time of the incident* giving rise to the alleged injuries complained of in this lawsuit, and, if so, state the following:

[questions regarding duties, wages, and dates of disability

ANSWER: No.

[Emphasis added.]

At deposition, plaintiff did not refer to future wage loss when describing all the ways the accident affected her life.

The trial court did not err in permitting the issue of plaintiff's lost income to go to the jury, or in denying defendants' motion for new trial or remittitur on this issue. The interrogatory directed to outstanding wage loss benefits was not on point because, fairly read, it referred to no-fault benefits for wage loss already incurred. The interrogatory directed to "all other items of expense or loss which were incurred by you . . . for which you ask compensation" did not directly inquire into future, as opposed to past, losses. At trial, plaintiff requested future economic damages only. The interrogatory regarding lost income was limited to past income, and the interrogatory regarding employment referred to the time of the incident and was answered accurately. At the deposition, defendants did not ask directly regarding any potential claim for future economic loss, and the question regarding how the accident affected plaitniff's life did not raise the issue because plaintiff was not yet ready to return to work. Defendants were able to impeach plaintiff with her answers to interrogatories. Further, defendants have not shown how they would have prepared for trial or approached the case differently.

Defendants' claim with respect to Charles Cook, plaintiff's husband, was not properly preserved. Mr. Cook testified at trial that because of the need to take care of his wife, he lost income of about $6500 a year from his lawn-care business. Plaintiffs' requested only future economic loss, for nine years. At trial, defendants objected to plaintiff's claim for future economic loss, but not Mr. Cook's. The objection was raised and overruled before Mr. Cook testified to his own loss. When Mr. Cook addressed his own lost income, defendants did not object to the claim being made, but addressed the issue through cross-examination regarding Mr.

Cook's answers to interrogatories. Further, the motion for new trial or remittitur and defendants' brief on appeal make only fleeting reference to Mr. Cook's claim and are focused primarily on plaintiff's claim. For example, in addressing the standard for reversal, defendants argue "In order to reverse, all this Court need find is that had plaintiffs been forthright in discovery and had not suppressed and concealed the information concerning the fact that Ms. Cook was seeking to recover economic damages, the availability of that evidence may have made a difference in the way defendants' counsel approached the case and prepared for trial, *Rock Island Bank, supra* at p 281." Further, we observe that the actual instructions to the jury did not include wage loss or lost income as an element of damages, and that the verdict form, agreed to by both sides, did not separate out economic from non-economic damages. Under these circumstances, defendants have not shown an entitlement to relief on this issue.

Affirmed.

/s/ Helene N. White
/s/ Kirsten Frank Kelly
/s/ Roman S. Gribbs